Filed 7/31/09 In re A.T. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re A.T., a Person Coming Under the Juvenile Court Law.	B213526 (Los Angeles County Super. Ct. No. CK67950)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. T.S., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Elizabeth Kim, Juvenile Court Referee. Affirmed.

Aida Aslanian, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, County Counsel, James M. Owens, Assistant County Counsel and Melinda White-Svec, Deputy County Counsel, for Plaintiff and Respondent.

Mother T.S. appeals from the juvenile court orders denying her petition for modification and terminating parental rights to her daughter. We affirm the orders.

FACTUAL AND PROCEDURAL SUMMARY

In April 2007, police were summoned when mother left four-month-old A.T. alone in a hot, unlocked vehicle while she went shopping. Mother returned approximately 10 minutes after the police arrived. She was arrested and charged with child endangerment. The Department of Children and Family Services (DCFS) detained A.T. and filed a Welfare and Institutions Code section 300[1] petition on her behalf, based on this incident. The petition also alleged that mother has mental and emotional problems, including depression, which endanger A.T.'s physical and emotional health and safety, and that A.T.'s father has a history of illicit drug use which prevents him from providing care for the child. Father is not a party to this appeal, and we limit our factual statement accordingly.

In June 2007, the original petition was dismissed and an amended petition filed, adding an allegation of domestic violence between the parents. In August 2007, the court sustained the amended petition and declared A.T. a dependent child. Mother was ordered to complete a program in parenting education emphasizing toddlers and infants, to participate in individual counseling with a licensed therapist to address child protection and domestic violence issues, to obtain ongoing psychiatric treatment, and to comply with doctor's orders for psychotropic medication. Father was ordered to randomly drug test, and to complete a substance abuse program if he tested dirty. He also was ordered to complete a parenting program and participate in individual counseling. The parents were given monitored visitation.

A.T. was placed in a fost-adopt home in September 2007. The parents moved to Michigan in December 2007, but returned to California in early February. In her status report for February 6, the social worker reported that mother had provided her with

---

[1] All statutory references are to this code.

information about participation in court-ordered counseling. When the social worker contacted the two named counseling centers, one in Glendale, the other in Michigan, she learned that mother had attended an intake session at each center, but had not had any subsequent counseling sessions. Mother's psychiatrist saw her approximately once a month to monitor her medication for depression, but her last counseling appointment with his office was in September 2007. Mother had enrolled in parenting classes, but they had not yet begun.

The worker also reported that mother "currently has a protection order against her" because she threatened the previous social worker. According to the report, mother left messages for the previous worker stating, "'I am going to kill you' and also stating 'You are a Manipulative Bitch.'" Mother had father arrested for domestic violence in December 2007, but later dropped the charges. DCFS recommended termination of reunification services and scheduling of a permanency planning hearing.

In her April 7, 2008 report, the social worker indicated mother had been consistent with visitation, and that the visits went well. The visit scheduled for March 6 had been cancelled because mother made threatening and inappropriate statements: "I am going to take you out" and "If you make me make a scene at the visit, I will." Neither parent had enrolled in services. The court terminated reunification services on April 9, and set a section 366.26 permanency planning hearing.

On July 30, 2008, mother filed a section 388 request to change court order. Mother sought release of the child to her, or reinstatement of family reunification services with unmonitored visitation. She stated she had consistently attended individual counseling since April 17, 2008, had been meeting with her psychiatrist and taking prescribed medication, and had been attending a parenting group since March 24, 2008.

At the August 6 hearing, the court denied mother's section 388 petition, stating there had been no change of circumstance and that the best interest of the child would not be promoted by the proposed change of order. That same date, DCFS submitted supplemental information for the court, indicating that on August 5, mother had left threatening telephone messages for the social worker. In one message, mother stated, "'I

think some people are going to die, and your head will rol[l] first.'" In the other, mother stated, "'I really want you to go to jail and I am going to try and make it happen.'" Mother's visits were subsequently changed to Chatsworth, which was the closest secure DCFS office.

On October 24, 2008, mother filed a section 388 petition seeking reinstatement of family reunification services. When the court continued the section 366.26 hearing until January, mother withdrew the petition.

Mother filed a third section 388 petition on January 9, 2009. She asked that A.T. be placed with her, with family maintenance services, or that family reunification services be reinstated with overnight or unmonitored visits. Mother asserted changed circumstances, including participation in parenting classes, individual counseling, and psychiatric treatment. She also noted she had ended her relationship with A.T.'s father; was employed, and had stabilized her life. She attached letters from service providers, her employer and others to support these assertions.

On January 13, 2009, the date set for the permanency planning hearing, the court asked counsel to address whether a sufficient showing had been made to set the section 388 petition for a hearing. After hearing argument, the court concluded that mother failed to show that the proposed change of order would promote the child's best interest. The court denied the petition.

The court then proceeded to the section 366.26 hearing. Mother testified, as did the current social worker. The court found that the child is adoptable, and that it would be detrimental to return her to her parents. It terminated parental rights and selected adoption as the permanent plan. Mother filed a timely appeal from the orders denying her section 388 petition and terminating her parental rights.

DISCUSSION

I

Mother claims the court erred in denying her section 388 petition filed on January 9, 2009 without affording her a hearing. Section 388 permits a parent or other person

having an interest in a dependent child to petition the juvenile court "for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court." (§ 388, subd. (a).) "If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held . . . ." (§ 388, subd. (d).)

In her petition, mother asserted the following changed circumstances: "Mother has been regularly and consistently participating in all facets of her court ordered case plan: parenting, individual counseling with a licensed therapist, psychiatric treatment. Mother ended her dysfunctional relationship with the Father. Mother is gainfully employed and has stabilized her life." Attached to the petition were letters documenting mother's participation in twice monthly individual counseling, psychiatric treatment with medication, parenting education classes, and freelance employment. She provided a letter from Dr. Morga, the psychiatrist who had treated her from June 2007 until January of 2008, when he retired and transferred her case. According to Dr. Morga, mother received treatment from his department "for medication management of an on-going condition of depression." He also noted she had experienced paranoia at one point during her treatment, but the symptoms subsided with additional medication. He reported that mother was open and communicative about her symptoms during her treatment. Also attached was a letter to mother from the deputy public defender representing her in the child endangerment case. Counsel noted that mother had become "much more responsive to court orders and to tasks being asked" of her, had been responsible with regard to court dates and paperwork, and appeared to be extremely motivated to complete all being asked of her to regain custody of her child. The court accepted these documents as authentic, and concluded that mother stated a change of circumstances, as required for a hearing under section 388.

But even where there is a change of circumstances, a hearing may be denied if the petition does not show that the requested modification would promote the best interests of the child. Under California Rules of Court, rule 5.570(d): "If the petition fails to state a change of circumstance or new evidence that may require a change of order or

termination of jurisdiction, *or that the requested modification would promote the best interest of the child*, the court may deny the application ex parte." (Italics added.)

In her petition, mother stated that the requested order would be better for A.T. because "Mother has been fully complying with her case plan and is demonstrating that she is capable of caring for her child safely and learning from her mistakes. It is better for [A.T.'s] long term interests if she can be safely raised by her biological Mother because she will not have to deal with the uncertainties of foster care, being adopted, and the confusion of not knowing her biological mother."

Other than mother's conclusory assumption that A.T.'s long term interests would be served by being raised by her biological mother, nothing in the petition suggests that the change of order would be in A.T.'s best interests. The child had been out of mother's care since she was four months old. During the entire dependency case, mother's visitation never progressed beyond monitored visitation of an hour or two, once or twice a week. There were no reports that A.T. was unhappy because mother's visits were short or infrequent. The child had been living in the home of the prospective adoptive family since September 2007. The social worker's reports consistently stated that A.T. was thriving in this fost-adopt home. This family had an approved adoption home study, and was committed to adopting A.T. Mother's assertion that A.T. would have to deal with the uncertainties of foster care and being adopted was thus without foundation.

The record in this case amply supports the trial court's conclusion that a hearing on the section 388 petition was not required because mother failed to show that the requested change of order would be in A.T.'s best interest.

Mother complains that the court essentially conducted a "pre-hearing" to decide whether a hearing should be granted. To the extent the court heard argument as to the sufficiency of the showing to necessitate a hearing, mother was afforded the opportunity to convince the court of the merits of her position. This was a benefit to her, not an additional burden.

II

Mother claims the court erred in terminating parental rights because she established the beneficial relationship exception under section 366.26, subdivision (c)(1)(B)(i). Under section 366.26, subdivision (c)(1), if a court finds that a child may not be returned to his or her parent and is likely to be adopted, it must select adoption as a permanent plan unless it finds that termination would be detrimental to the child under one of several specified exceptions. The beneficial relationship exception relied on by mother is set out in subdivision (c)(1)(B)(i): "The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

In this case, A.T. was in mother's custody for less than five months. At various times during the 21 months of dependency, mother's visitation was scheduled for once or twice a week. Mother never progressed beyond monitored visitation for 90 minutes or two hours, and on several occasions she left visits early because she had other obligations. Her own conduct affected the frequency and regularity of the visits. After she threatened the social worker, mother's visitation was moved to a secure location at a much greater distance from her home. Between October 2008 and January 2009, when this hearing was held, mother missed nine visits, some because she was ill, others because she missed her transportation. Despite the missed visits, mother maintained consistent and regular contact with A.T.

The question is whether mother's relationship with A.T. is of sufficient strength to satisfy the beneficial relationship exception. For purposes of this statutory exception, "[a] beneficial relationship is one that 'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.' (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The existence of this relationship is determined by '[t]he age of the child, the portion of the child's life spent in the parent's custody, the "positive" or "negative" effect of interaction between parent and child, and the child's particular needs.' (*Id.* at p. 576.)" (*In re Amber M.* (2002) 103 Cal.App.4th 681, 689.) It is not essential that the child's "primary

attachment" be to the parent, nor that the parent and child have maintained day-to-day contact. (*In re. S.B.* (2008) 164 Cal.App.4th 289, 299.) "The exception may apply if the child has a 'substantial positive emotional attachment' to the parent." (*Ibid.*)

Mother testified that when she visits, A.T. knows who she is, and calls her "Mommy." A.T. is glad to see her. She is usually in the social worker's arms, "but she reaches out and smiles" and tries to reach for mother. During the visits, mother helps A.T. with her speech, trying to encourage the child to learn and practice new words. Mother is working on building A.T.'s trust in her. According to mother, when the visit is over, A.T. "seems a little uncertain as to why mommy is leaving, but she knows the routine, and she says 'bye-bye.' And she gives me a kiss. . . . We hug and kiss. I tell her I love her and that I'll see her next Wednesday or whenever I see her next."

Asked if she has a parental relationship with A.T., mother responded: "I'm completely her parent. As much as anyone can be a parent that sees their child once or twice a week. I'm more so than that in her eyes. Again, I find it a miracle how much she values me, and it would be a terrible loss to [A.T.] if I were no longer in the picture."

The social worker testified that A.T. also calls the foster mother "mommy." At the time of the hearing, A.T. had been in her fost-adopt home for 16 months, since September 2007. The foster parents reportedly provided A.T. "with love, care and stability." They had an approved adoption home study, and were ready to adopt A.T. if parental rights were terminated.

A.T. spent only a brief time in mother's custody, has had very limited visitation with mother, and has been in a stable home setting with prospective adoptive parents for 16 months. While her visits with mother were pleasant, there is no indication that continuing that relationship would be more beneficial to A.T. than allowing her the permanence and stability of adoption by the family with whom she has been living. The evidence supports the court's conclusion that the beneficial relationship exception does not apply.

DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.